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3
4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 UNITED STATES OF AMERICA,)

8 Plaintiff,)

9 vs.)

10 ALBERT LEON HARRIS,)

11 Defendant.)
_____)

2:05-cr-00332-RCJ-GWF

ORDER

12 Pending before the Court is Petitioner Albert Leon Harris's Motion to Vacate Under 28
13 U.S.C. § 2255 (ECF No. 142). For the reasons given herein, the Court denies the motion.

14 **I. FACTS AND PROCEDURAL HISTORY**

15 A grand jury first indicted Petitioner on August 24, 2005 for a single count of possession
16 with intent to distribute a controlled substance. (*See* Indictment, Aug. 24, 2005, ECF No. 1).
17 The Second Superseding Indictment ("SSI") lists three counts of that offense and a fourth count
18 for possession of a firearm during and in relation to a drug crime. (*See* SSI, Oct. 10, 2007, ECF
19 No. 96). During the second day of trial, Defendant pled guilty to the first and fourth counts
20 pursuant to a plea agreement. (*See* Mins., Dec. 4, 2007, ECF No. 129). On March 3, 2008, the
21 Court sentenced Defendant to sixty (60) months imprisonment for each count, to run
22 consecutively, to be followed by five (5) years of supervised release for each count, to run
23 concurrently. (*See* J. 1–3, Mar. 3, 2008, ECF No. 136). Defendant did not appeal, and the
24 present motion is his first habeas corpus petition. Defendant brings four counts: (1) ineffective
25 assistance for failing to file a notice of appeal; (2)–(3) ineffective assistance during plea

negotiations; and (4) actual innocence.

II. LEGAL STANDARDS

A. Untimely and Successive Habeas Corpus Petitions

A federal habeas corpus petitioner must bring his petition under 28 U.S.C. §§ 2241, 2255 within one year of the latest of: (1) final judgment of conviction; (2) the removal of any impediment to bringing the petition caused by unconstitutional government action; (3) the date on which the Supreme Court first recognizes the right asserted, if the Supreme Court has made the right retroactively applicable to collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f). Successive petitions must be approved by the Court of Appeals. *See id.* at § 2255(h).

B. Waiver of Appeal Rights

A criminal defendant who pleads guilty implicitly waives the right to challenge any pre-conviction error, unless the alleged error relates directly to the voluntariness or intelligence of the guilty plea itself:

When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea

Tollett v. Henderson, 411 U.S. 258, 267 (1973). Furthermore, a defendant may explicitly waive the right to appeal the sentence via plea agreement, so long as the waiver is voluntary and intelligent. *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008).

C. Procedural Default

Even where the right to appeal an issue has not been waived, issues decided on direct review, or which could have been raised on direct review but were not, cannot be brought in a

§ 2255 petition. *Reed v. Farley*, 512 U.S. 339, 358 (1994). The former kinds of claim res judicata under ordinary claim preclusion principles, and the latter kinds of claim are said to be “procedurally defaulted” and cannot be raised later in a collateral attack. *See id.* Procedural default is excused where a defendant can show: (1) cause and prejudice; or (2) actual innocence. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003) (citing *Bousley v. United States*, 523 U.S. 613, 622 (1998)).

1. Cause and Prejudice

“Cause” means “some objective factor external to the defense” that impeded the defendant’s efforts to comply with the procedural requirement. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Among the reasons that can constitute “cause” are government coercion, *see United States v. Wright*, 43 F.3d 491, 497–99 (10th Cir. 1994), ineffective assistance of counsel, *see McCleskey*, 499 U.S. at 494, and a “reasonable unavailability of the factual or legal basis for the claim,” *see id.* “Prejudice” means that “the constitutional errors raised in the petition actually and substantially disadvantaged [a defendant’s] defense so that he was denied fundamental fairness.” *Murray v. Carrier*, 477 U.S. 478, 494 (1986). A showing of prejudice requires demonstration of a “reasonable probability that . . . the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Vansickel v. White*, 166 F.3d 953, 958–59 (9th Cir. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

Ineffective assistance of counsel is “cause” excusing procedural default only where the failure rises to the level of a constitutional violation under *Strickland*. *United States v. Skurdal*, 341 F.3d 921, 925–27 (9th Cir. 2003) (citing *Strickland*, 466 U.S. 668). Ineffective assistance of counsel claims may be brought for the first time in a § 2255 petition, even if they could also have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

1 There is a “strong presumption” of reasonable professional conduct. *Strickland*, 466 U.S.
2 at 698. When this presumption is overcome and an attorney’s “unprofessional errors” are such
3 that there is a “reasonable probability” the result would have been different had the errors not
4 occurred, the defendant has been deprived of his Sixth Amendment rights. *Kimmelman v.*
5 *Morrison*, 477 U.S. 365, 375 (1986). “Reasonable probability” is a lower standard than “more
6 likely than not.” *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Counsel’s tactical decisions with
7 which a defendant disagrees do not rise to the level of ineffective assistance unless the decisions
8 are so poor as to meet the general test for constitutionally defective assistance. *See Dist.*
9 *Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2330 (2009).

10 **2. Actual Innocence**

11 “To establish actual innocence for the purposes of habeas relief, a petitioner ‘must
12 demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror
13 would have convicted him.’” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011)
14 (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (quoting *Bousley*, 523 U.S. at
15 623)). “A petitioner is actually innocent when he was convicted for conduct not prohibited by
16 law.” *Alaimalo*, 645 F.3d at 1047 (citing *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th
17 Cir. 2001)).

18 **III. ANALYSIS**

19 The Court denies the Petition as untimely. First, Petitioner filed the Petition more than
20 one year after the judgment of conviction became final. Second and third, Petitioner alleges no
21 unconstitutional government action impeding his Petition¹ or any newly recognized right. And

22 ¹Petitioner appears to allege that his attorney’s failure to file a notice of appeal
23 unconstitutionally impeded his ability to bring his other claims *on direct appeal*. But Petitioner
24 waived his right to appeal pre-conviction error when he pled guilty, *see Tollett*, 411 U.S. at 267,
25 so counsel simply did not err by failing to file a notice of appeal. And even if the Court were

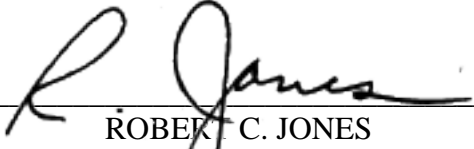
1 fourth, Petitioner's claims are all based on information admittedly available to him more than
2 one year before he filed the Petition.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that the Motion to Vacate Under 28 U.S.C. § 2255 (ECF No.
5 142) is DENIED.

6 IT IS SO ORDERED.

7 Dated this 2nd day of September, 2011.

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10 ROBERT C. JONES
11 United States District Judge
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22 _____
23 absolutely convinced that the guilty plea was made unintelligently—based on Petitioner's claim
24 today that he did not in fact employ a firearm during the offense under the meaning of the
25 statute—Petitioner does not allege that his attorney's errors (or any other government action)
impeded him from bringing his Petition within one year of final judgment.